

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

THOMAS C. SMITH,)	
)	
Plaintiff,)	
)	
v.)	Case No. 16 C 2056
)	
NATIONAL SERVICE SOLUTIONS, INC.,)	
)	
Defendant.)	

MEMORANDUM ORDER

National Service Solutions, Inc. ("National Service") has filed its Answer to the Amended Complaint brought against it by its ex-employee Thomas Smith ("Smith"). This brief memorandum order is issued sua sponte because of the problematic nature of two of the three affirmative defenses ("ADs") appended at the end of the Answer itself.

Both ADs 1 and 2 contain the words "to the extent" -- almost always a tipoff that what a defendant is asserting is purely hypothetical, rather than stating a currently viable AD. In this case those two ADs are flawed for different reasons:

1. If Smith is indeed alleging "acts of discrimination, failure to accommodate or retaliation that arose more than 300 days prior to the filing of his administrative charge," as AD 1 asserts, it may be true that such earlier acts may not themselves be actionable. But such allegations may nonetheless be appropriate, for they may be relevant toward establishing National Service's discriminatory mindset or intent. In any event, AD 1

must be fleshed out to particularize which of Smith's allegations in his Amended Complaint are being challenged.

2. AD 2 is clearly speculative and premature, for it advances the contention that Smith must mitigate his damages -- something that clearly is not known to National Service now, but may perhaps be learned during the course of discovery.

Accordingly both ADs 1 and 2 are stricken sua sponte (AD 3 is not addressed here, and this memorandum order neither expresses nor implies any views on its subject matter). Because of the possibility of the future assertion of either or both of ADs 1 and 2 in an appropriate manner, they are stricken without prejudice.



Milton I. Shadur
Senior United States District Judge

Date: March 17, 2016